PUBLIC MATTER – DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **CAREY BRENT SCOTT**, A Member of the State Bar.	**94-O-17860** **OPINION ON REVIEW**

Both the State Bar of California (State Bar) and respondent Carey Brent Scott seek review of a hearing judge's decision finding respondent culpable of filing a frivolous lawsuit in bad faith and for a corrupt motive. The hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that he be placed on probation for two years on conditions, including 60 days' actual suspension.

Respondent filed and pursued a series of four related lawsuits. After each action was resolved unfavorably to respondent, he filed the next. The hearing judge found that respondent was not culpable with respect to the first three actions, but had "crossed the line" with respect to the filing of the fourth matter and therefore was culpable. On review, the State Bar asserts that respondent should be found culpable for filing and pursuing the first of the four lawsuits as well. The State Bar does not seek an increase in the recommended discipline. Respondent argues on review that he is not culpable of any misconduct with respect to any of the four lawsuits, but that if he is culpable the discipline should be reduced to a reproval at most.

We have independently reviewed the record in this proceeding and conclude that the hearing judge's factual findings are supported by the record, and we adopt them with the modifications noted below. The notice of disciplinary charges alleges that respondent is culpable of single violations of Business and Professions Code section 6068, subdivisions (c) and (g) and

section 6106 as a result of his conduct in filing and pursuing the four lawsuits as a whole.[1] It does not charge four separate violations of each of these statutes. Viewed from this perspective, we conclude that the record clearly and convincingly demonstrates that respondent is culpable of filing and pursuing frivolous actions in bad faith and for a corrupt motive. Although we modify slightly the hearing judge's culpability conclusions, we find that the discipline recommendation is appropriate based on the record as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

James Cooke, a pipe fitter, was severely injured in an explosion at his workplace in October 1988. Cooke's wife, Ann, employed respondent to represent Cooke in the personal injury and worker's compensation cases arising from the accident. Although Cooke did not sign the retainer agreement, he orally approved of respondent representing him and fully ratified that representation.

Thereafter, Allen Jones, business manager of Cooke's union, became concerned that respondent was not properly representing Cooke. In February 1989, during a dinner seminar conducted by the law firm of Silver, McWilliams, Stolpman, Mandel & Katzman (Silver firm), Jones met attorney Krissman, a partner in the Silver firm. A few days later, Jones called Krissman and asked him to check respondent's credentials. Krissman researched respondent in Martindale-Hubbell and O'Brien's Evaluator and found neither an ability rating for respondent

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[1] All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6068, subdivision (c) provides that an attorney has a duty to maintain or counsel only such proceedings, actions, or defenses which appear just or legal. Section 6068, subdivision (g) provides that an attorney has a duty "[n]ot to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for suspension or disbarment.

[2] Although we have adopted the hearing judge's factual findings, we set forth here only those findings relevant to our disposition. In addition, we have added factual findings that we conclude are clearly and convincingly established based on our independent review of the record.

nor evidence that he had conducted any jury trials. Krissman informed Jones of the results of his research and informed him that none of his partners at the Silver firm had ever heard of respondent.

Jones called Cooke and informed Cooke of his concern about respondent's handling of Cooke's case and of his conversation with Krissman. Jones also told Cooke that he would arrange to have a lawyer call Cooke. Jones then informed Krissman that Cooke was interested in a second opinion, gave Krissman Cooke's telephone number, and asked Krissman to call Cooke to "render a second opinion" regarding Cooke's case.

In February 1989, Krissman called Cooke, confirming that he was calling at the behest of Jones to give Cooke a second opinion about his case. Krissman told Cooke about the Silver firm's experience in handling industrial accident cases, that respondent had never before handled a case as big as Cooke's, and that he could do a better job. Krissman's conversation with Cooke lasted approximately 15-20 minutes and resulted in an appointment for a meeting at Krisssman's office three days later.

After Krissman's telephone call, the Cookes were briefly concerned about whether they had employed a qualified attorney by hiring respondent. Cooke called respondent the next day and informed him of the conversations with Jones and Krissman. Cooke told respondent that Krissman told him that respondent had never had a case that size and that Krissman claimed he could do a better job than respondent. However, Cooke assured respondent that he was "totally and completely satisfied" with respondent's representation, that he had complete confidence in respondent, that he (Cooke) knew before he hung up the phone with Krissman that he (Cooke) was not going to go to the meeting, and that he had no intention of changing attorneys. Nevertheless, at the end of their conversation respondent was uncertain whether Cooke would use another lawyer's services and did not know whether the appointment with Krissman would

be cancelled. Respondent, however, believed he had convinced Cooke not to go to Krissman's appointment.

Mad and "extremely upset," respondent called Jones the next day. Jones relayed to respondent his concerns about the way respondent was handling Cooke's case. Respondent then called the Silver firm that same day but was unable to speak to Krissman. Two days later, fearing that Cooke would not continue to employ him as Cooke's attorney and not having heard from Krissman, respondent filed a lawsuit in the superior court against Krissman and the Silver firm for intentional interference with contract, for allegedly interfering with respondent's retainer agreement with Cooke, and for disparagement and defamation, for allegedly publishing to Jones and Cooke false statements that defamed respondent's legal reputation (lawsuit #1). Respondent arranged to have the complaint served on Krissman at the time of Cooke's scheduled appointment with Krissman. Cooke did not meet with Krissman.

Concerned that Cooke might leave him, respondent hired his wife to work in his law firm so that he could devote more attention to the Cooke case. Respondent and his wife also began socializing with the Cookes and went with them to Hawaii and on camping trips. Respondent also began to encourage Cooke to attend other trials that respondent was litigating and to participate in each step of his own case.

In November 1991, respondent settled Cooke's civil case for $5.2 million. Respondent received over $1.6 million in legal fees from the settlement.

Respondent knew prior to filing lawsuit #1 that Jones had asked Krissman to call Cooke. Respondent filed lawsuit #1 for several reasons: "To put a stop to the practices of [the Silver firm's] and Mr. Krissman's actions;" to get the attention of the defendants; for a $150 filing fee, respondent could "prioritize [the defendants'] calendar;" to recover "the damages that were caused to my reputation and my law firm;" and to teach a lesson to the defendants. Respondent

also filed lawsuit #1 because he had no explanation from Krissman for his actions as he had not received a follow-up call from Krissman.

In April 1991, respondent offered to settle with the defendants for $5,867, the amount of respondent's costs up to that point in time. The offer was not accepted. The defendants' motion for summary judgment in April 1991 was denied.

Lawsuit #1 was tried before a jury in January 1992. At the close of respondent's case-in-chief after six days of trial, the trial court granted a judgment of nonsuit in favor of Krissman and the Silver firm. The court, on its own motion, ordered a Code of Civil Procedure section 128.5 sanctions hearing. The hearing was held in February 1992, and the court awarded sanctions against respondent in the amount of $218,299 for having filed and pursued a frivolous lawsuit in bad faith.

After the sanctions were awarded on the record at the hearing but before the written order was signed, respondent moved to disqualify the trial judge, Honorable James R. Ross. The grounds for the motion were, inter alia, that Judge Ross was biased against respondent due to his strong personal and professional relationship with the Silver firm in that Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and that Judge Ross was indebted to one of the named partners, Stolpman, because Stolpman had assisted Judge Ross in getting his judicial appointment. Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal. Respondent's petition for a writ of mandamus was denied by the Court of Appeal, and review was denied by the California Supreme Court.

Respondent appealed the judgment and sanctions award in lawsuit #1. In an unpublished opinion filed in December 1993, the Court of Appeal affirmed both the nonsuit and sanctions award. The Court concluded that the intentional interference with contract claim failed for several reasons. First, there was no evidence of intentional or unjustified acts by Krissman intended to disrupt the contractual relationship as: Jones asked Krissman to call Cooke, Jones contacted Cooke and suggested he speak to Krissman, and Cooke agreed and told Jones to have Krissman call him. Next, there was absolutely no disruption of Cooke's contract with respondent as: Cooke was completely satisfied with respondent and told him so, Cooke had some doubts about respondent's abilities for one day at most, and there was no evidence that Cooke ever had any intention of finding another lawyer. Finally, respondent was not damaged as spending money to cement his relationship with Cooke was simply not legal damage.

The Court of Appeal also concluded that there was no defamation or disparagement shown. Cooke never understood the statements to be defamatory, and respondent's reputation in the community was not damaged as the statements were not made to anyone other than Jones and Cooke and the uncontroverted evidence showed that respondent enjoyed great success as a lawyer and had a good reputation. Further, Krissman's statements were subject to a qualified privilege as he was providing a legally permissible second opinion to Cooke, and there was no evidence that Krissman's statements were motivated by hatred or ill will and therefore respondent failed to show actual malice sufficient to overcome that privilege.

Finally, the Court of Appeal concluded that no abuse of discretion was shown with regard to the sanctions award. The evidence supported the trial court's conclusion that respondent's action was meritless and brought in bad faith as respondent did not file the lawsuit to recover damages but to teach the defendants a lesson, and it was apparent that before the lawsuit was filed, not to mention before trial, respondent knew that his relationship with Cooke had not been disrupted and that he had not been defamed. Further, the Court rejected respondent's argument

that there was insufficient evidence presented to support the amount of the award. Respondent unsuccessfully sought a rehearing in the Court of Appeal and review by the California Supreme Court and United States Supreme Court.

In August 1994, respondent filed a second petition for a writ of mandate with the Court of Appeal seeking to set aside the judgment and sanctions in lawsuit #1 on the grounds that newly discovered evidence showed that Judge Ross was prejudiced against respondent. The alleged new evidence was that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and that Judge Ross had an undisclosed professional relationship with the Silver firm attorneys in that they had all been active members of the Los Angeles Trial Lawyers Association (LATLA) for 15 years. Respondent's petition was denied, and review by the California Supreme Court was denied.

In January 1995, respondent filed a civil rights action in the United States District Court against Judge Ross, Krissman, Stolpman, and Robert Baker (defense counsel in lawsuit #1), alleging in one cause of action that Judge Ross violated his civil rights and in a second cause of action that the remaining defendants conspired to violate his civil rights (lawsuit #2). Respondent asserted, inter alia, that Judge Ross was a biased decision maker due to his close personal and professional relationship with Stolpman and Baker in that they were personal friends and had all been members of LATLA, that Judge Ross attended several private parties hosted by Baker, and that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office both before and during the trial of lawsuit #1; that Judge Ross's bias was evidenced by his conduct during the trial of lawsuit #1 and by his legally erroneous rulings in the case in that Judge Ross became an advocate for the defendants in lawsuit #1 and awarded the sanctions without sufficient evidence; and that Judge Ross and the other defendants entered into a conspiracy to violate his civil rights by, inter alia, improper ex parte communications and

agreeing beforehand to produce a verdict against respondent in lawsuit #1 for financial and professional gain.

Motions to dismiss by the defendants for, inter alia, failure to state a claim upon which relief could be granted were denied by the district court. Judge Ross filed a motion for summary judgment or for judgment on the pleadings. Judge Ross's motion was granted on collateral estoppel grounds in that the issues raised against him regarding the alleged personal and professional relationship were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits and that the remaining issues were decided against respondent on the merits by the Court of Appeal opinion in lawsuit #1. Judgment was entered in favor of Judge Ross and against respondent in July 1995.

In August 1995, the district court, sua sponte, issued an Order to Show Cause as to why lawsuit #2 should not be dismissed for lack of subject matter jurisdiction based on a then-recent decision of the Ninth Circuit. In September 1995, the district court dismissed lawsuit #2 as to all defendants for lack of subject matter jurisdiction and vacated the judgment in favor of Judge Ross as well as the order granting his summary judgment motion. No appeal was filed.

In September 1995, respondent filed a complaint for equitable relief against Krissman and the Silver firm in the superior court (lawsuit #3) seeking to set aside the judgment and sanctions award in lawsuit #1. The complaint alleged that Judge Ross, Baker and the defendants, Krissman, the Silver firm, and members of that firm, concealed material facts and procured the judgment and sanctions in lawsuit #1 by extrinsic fraud. The factual allegations were substantially the same as the factual allegations in lawsuit #2 and included that Judge Ross had a close personal and professional relationship with Stolpman and Krissman and that all three had been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in

lawsuit #1; and that Judge Ross assumed a partisan role and made legally erroneous rulings in lawsuit #1.

The defendants' demurrer in lawsuit #3 was overruled. Thereafter, the defendants filed a motion for summary judgment which was also denied. In denying that motion, the court noted the following triable issues of disputed fact: (1) whether Judge Ross had personal or professional relationships with Baker, Stolpman, and/or Krissman which should have been disclosed but were not and the impact of those facts, if any, on the decisions made by Judge Ross in lawsuit #1; (2) whether Judge Ross had a private telephone line in his chambers or court which was utilized for ex parte communications with Krissman, Stolpman or Baker; and (3) the number and extent of telephone calls or contacts between Judge Ross and Krissman, Stolpman or Baker during the pendency of lawsuit #1. The defendants' petition for a writ of mandate was denied.

A bench trial was held in lawsuit #3 in October 1996. At the close of respondent's case-in-chief following the extensive testimony of 10 witnesses and 58 exhibits, the trial court entered judgment against respondent under Code of Civil Procedure section 631.8. The court held that respondent failed to prove who made any of the telephone calls; that there was no evidence of a close personal relationship between Judge Ross and the other attorneys; and that there was no evidence that Judge Ross had any kind of bias or prejudice against respondent. The court also commented on the merits of lawsuit #1, stating "I really sincerely feel that anyone who heard the case, any judge who heard the case would have granted the non-suit." Lawsuit #3 was dismissed, but no sanctions were ordered against respondent. No appeal was filed.

One week after the dismissal, respondent filed an action against Baker and Judge Ross in superior court (lawsuit #4), alleging civil rights violations and defamation against Judge Ross and fraudulent billing by Baker. The lawsuit alleged that respondent's civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuits #2 and #3, and

included that Judge Ross had a close personal and professional relationship with Stolpman and Baker and that Ross, Baker, and Stolpman had all been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in lawsuit #1; and that Judge Ross assumed a partisan role and made erroneous rulings in lawsuit #1.

The defamation cause of action against Judge Ross alleged that after he retired from the bench in July 1995, Judge Ross told several other judges in the judges' lunchroom in the courthouse, "I've got another lawsuit by C. Brent Scott," to which the other judges replied, "Oh, my god, no. Him again," to which Ross replied, "Yeah, He'll never quit; same allegations." The complaint also alleged that Judge Ross sent written communications to several judges regarding Judge Ross's defense of charges brought by respondent with the Commission of Judicial Performance, which communications allegedly "blamed" respondent for the attorney's fees Judge Ross had incurred in defending the Commission action. The fraud cause of action against Baker alleged that Baker had submitted false billings to Judge Ross in support of the sanctions motion in lawsuit #1.

The defendants' demurrers to the complaint in lawsuit #4 were granted without leave to amend in February 1997. The court ruled that the first cause of action against Judge Ross for violating respondent's civil rights was barred pursuant to the doctrines of collateral estoppel and judicial immunity; that the second cause of action for defamation against Judge Ross was barred as all statements allegedly made by Judge Ross were mere opinion; and that the third cause of action alleging fraud against Baker was barred based on the statute of limitations and the doctrine of collateral estoppel. Stolpman's motion for sanctions against respondent was denied. No appeal was filed.

The defendants in lawsuit #1 recovered approximately $130,000 of the $218,299 sanctions ordered in that case by way of a levy on a bank account in which respondent had an interest. The remainder has apparently been discharged as a result of respondent's bankruptcy.

As indicated above, the notice of disciplinary charges alleges that respondent violated sections 6068, subdivisions (c) and (g), and 6106 as a result of the above conduct. With respect to lawsuit #1, the hearing judge determined that although respondent had some improper motives in filing lawsuit #1, such as to teach the defendants a lesson, he also had an honest and reasonable belief that Krissman and the Silver firm were attempting to solicit the Cooke case away from him and his firm; that Krissman and the Silver firm might be attempting to obtain for their own financial gain the biggest case of respondent's career; and that Krissman had defamed the reputations of respondent and his law firm. The hearing judge concluded that respondent had an honest and reasonable belief that the causes of action alleged in lawsuit #1 were well-founded and viable and that the State Bar had therefore failed to prove by clear and convincing evidence that by filing lawsuit #1 respondent violated any of the charged statutory provisions.

With respect to lawsuit #2, the hearing judge noted that the facts alleged in lawsuit #2 regarding the conspiracy by Judge Ross and attorney Baker were not alleged in lawsuit #1, that initial motions to dismiss by the defendants were denied, and that lawsuit #2 was dismissed and not decided on its merits. The hearing judge concluded that respondent was therefore not culpable of violating any of the charged statutes in filing and pursuing this lawsuit.

With respect to lawsuit #3, the hearing judge concluded that respondent was not culpable as the State Bar failed to prove by clear and convincing evidence that respondent lacked good faith in filing lawsuit #3 in state court after lawsuit #2 was dismissed and not decided on the merits in federal court.

With respect to lawsuit #4, the hearing judge determined that by filing and pursuing lawsuit #4 against Judge Ross and attorney Baker, respondent "crossed the line" and "reached the

point that he was engaging in an obsessive pattern of conduct, the sole purpose of which was designed to harass and to be vindictive" towards those he considered responsible for the judgment and sanctions in lawsuit #1. The hearing judge concluded that the claims raised by respondent in lawsuit #4 had "essentially been raised and litigated in lawsuit #3 and/or were not meritorious or just" and that respondent therefore violated section 6068, subdivisions (c) and (g) by filing lawsuit #4. Furthermore, the hearing judge concluded that respondent either intentionally, recklessly, or with gross negligence filed lawsuit #4, a frivolous action, and was therefore culpable of an act of moral turpitude in violation of section 6106.

In mitigation, the hearing judge found that respondent had no prior record of discipline in eight years of practice before the misconduct and three years after the misconduct and before the State Bar trial. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[3] Respondent presented evidence of his good character and community service. However, the hearing judge gave little weight to the good character evidence as other evidence indicated that respondent was "impulsive, revengeful, arrogant, and lack[ed] responsibility," and the character witnesses were not aware of the full extent of respondent's misconduct.

In aggravation, the hearing judge found that respondent's misconduct significantly harmed Judge Ross, Baker and the administration of justice (std. 1.2(b)(iv)); that respondent demonstrated indifference to the consequences of his misconduct and had shown no remorse or recognition of his wrongdoing (std. 1.2(b)(v)); and that respondent's testimony in the State Bar proceeding lacked candor and credibility (std. 1.2(b)(vi)).

DISCUSSION

As indicated above, both the State Bar and respondent have sought review of the hearing judge's decision. The State Bar agrees with the hearing judge's culpability conclusions regarding lawsuit #4, but argues that we should also find respondent culpable for filing and pursuing

[3] All further references to standards are to these standards unless otherwise noted.

lawsuit #1. Respondent agrees with the hearing judge that he is not culpable with respect to the first three lawsuits, but asserts that he engaged in no impropriety in filing and pursuing the fourth.

The three-count notice of disciplinary charges in this case charges in the first cause of action that respondent's conduct in filing and pursuing all four lawsuits and the related actions was a violation of section 6106. The second cause of action charges that by filing and pursuing all four lawsuits and the related actions, respondent repeatedly filed lawsuits, motions, and petitions which were unfounded in violation of section 6068, subdivision (c). The third cause of action charges that in filing and pursuing all four lawsuits and the related actions respondent acted in bad faith, out of spite, with a retaliatory motive, and with the purpose to harm others and cause delay in the judicial process in violation of section 6068, subdivision (g).

In reaching his culpability conclusions, the hearing judge examined respondent's conduct in each of the lawsuits separately. The parties have done the same in their initial briefs on review. As a result of the manner in which the misconduct was charged, we conclude that the issue to be determined is whether respondent's conduct in filing and pursuing the four lawsuits and related actions as a whole violated the specified statutory provisions. We gave the parties an opportunity to file supplemental briefs addressing this issue. In its supplemental brief the State Bar takes the position that the determination of culpability should be made from respondent's entire course of conduct. In his supplemental brief, respondent argues that his four lawsuits must be individually evaluated and, even if respondent's actions are considered in the aggregate, they do not constitute a violation of the charged statutes.

At the outset we note, as did the hearing judge, the general rule that a civil verdict and judgment have "no disciplinary significance apart from the underlying facts." (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) Nevertheless, civil findings made under a preponderance of the

evidence test are entitled to a strong presumption of validity in disciplinary proceedings if they are supported by substantial evidence. (*Ibid*.)

The trial judge in lawsuit #1 found that respondent knew prior to filing that lawsuit that he had not been defamed, that his law firm had not been disparaged, and that his retainer contract with the Cookes had not been interfered with at all. These findings are supported by substantial evidence in the record before us. The allegedly defamatory statements were made to Cooke and Jones only. Cooke did not understand the statements to be defamatory and told respondent prior to lawsuit #1 being filed that he was completely happy with respondent and had no intentions of changing lawyers. Further, there was simply no evidence showing that respondent's reputation in the community, or that of his firm, was damaged as a result of the statements. The hearing judge's conclusion that respondent filed lawsuit #1 based on his honest and reasonable belief in its validity is contrary to these civil findings and does not appear to have accorded the civil findings the strong presumption of validity to which they were entitled.[4] Nevertheless, the hearing judge's conclusions with respect to lawsuit #1 focused entirely on the propriety of the filing of that lawsuit. By their express language both section 6068 subdivisions (c) and (g) apply not only to the filing of an action or proceeding, but to the continuation of that proceeding in violation of the subdivisions.

By the time of the trial in lawsuit #1 respondent had settled Cooke's case for $5.2 million and received over $1.6 million in legal fees. Absolutely no evidence was presented at that trial showing that Cooke ever had any intention of changing lawyers. Absolutely no evidence was presented showing that respondent's or his firm's reputation in the community had been

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[4] The State Bar asserts that "once that strong presumption of validity is established, the burden shifts to the respondent attorney to rebut the presumption." The State Bar cites no authority for the proposition and we are aware of none. As in any discipline case, the State Bar bears the burden of proving culpability by clear and convincing evidence. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 725.)

damaged. In fact, it is clear from respondent's and his wife's testimony in lawsuit #1 that his legal business was flourishing throughout this time. The only evidence respondent presented even remotely pertaining to damages related to the interference with contract cause of action and showed that he hired his wife to work in his firm and spent time and money to cement his relationship with the Cookes. As the Court of Appeal held, this "simply cannot be considered legal damage."

Respondent knew before filing lawsuit #1, not to mention before the trial of that action, that the controversy involved a single 15-20 minute conversation between Krissman and respondent's client which was initiated by Krissman at the behest of Jones and which had not caused respondent any harm. He had the lawsuit served on Krissman at the same time as Cooke's scheduled appointment. Without ever serving any written discovery on the Silver firm, respondent noticed and deposed all of the partners of the firm at a location that was a two-hour drive from the Silver firm. None of the deponents had any knowledge of the telephone call. Respondent did not believe that Cooke was going to change lawyers, but, none the less, continued the action.

In short, respondent suffered absolutely no damages as a result of the telephone conversations between Krissman and Jones and between Krissman and Cooke. Yet, he doggedly pursued the case through a several-day jury trial to its unsurprisingly unsuccessful completion. Clearly, respondent selected a means of redress that was out of all proportion to what can only be characterized as a minor and rather innocuous incident. This is strong circumstantial evidence showing that in pursuing lawsuit #1 respondent was motivated in large measure by spite and vindictiveness.

Respondent's dogged pursuit of questionable claims continued following the sanctions award. In his motion to disqualify Judge Ross, respondent asserted that Judge Ross was biased against him due to his strong personal and professional relationship with the Silver firm in that

Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and in that Judge Ross was indebted to Stolpman because Stolpman had assisted Judge Ross in getting his judicial appointment. Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal.

In his direct appeal of lawsuit #1, respondent contended that Judge Ross made erroneous rulings in the case and that the motion to disqualify was wrongly decided. The Court of Appeal found no merit to the former and did not review the disqualification ruling as it was reviewable only by mandamus.

In respondent's second mandamus petition he again asserted that Judge Ross was biased against him based on newly discovered evidence showing that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and that Judge Ross had an undisclosed professional relationship with the Silver firm attorneys in that they had all been active members of LATLA for 15 years. The second petition was denied.

Respondent again raised the issue of Judge Ross's alleged bias in lawsuit #2. There he alleged that Judge Ross's bias was evidenced by his strong personal relationship with the Silver firm attorneys, by telephone calls between Judge Ross's courtroom and the Silver firm, by his erroneous rulings made in lawsuit #1, by Judge Ross's conduct during the trial of lawsuit #1, and by his award of sanctions based on insufficient evidence. The trial judge in lawsuit #2 granted Judge Ross's summary judgment motion on collateral estoppel grounds, concluding that the issues raised against Judge Ross regarding the alleged personal and professional relationship

were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits, and the remaining issues were decided against respondent on the merits by the Court of Appeal's opinion in lawsuit #1. We recognize that the district court ultimately dismissed lawsuit #2 and vacated the summary judgment order. Nevertheless, the summary judgment ruling should have caused respondent to reconsider the merits of his claims.

Undeterred, respondent asserted virtually identical claims regarding Judge Ross's alleged bias in his complaint for equitable relief in lawsuit #3.[5] Respondent was given a full opportunity at the trial of this lawsuit to present any and all evidence he had to prove his claims regarding Judge Ross's bias. He was not able to do so. He failed to prove who made any of the telephone calls; he failed to prove that there was a close personal relationship between Judge Ross and the other attorneys; and he failed to prove that Judge Ross had any kind of bias or prejudice against respondent. Respondent's lawsuit was dismissed and he did not appeal.

One week after the dismissal respondent filed lawsuit #4, alleging in part that his civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuit #2 and were the very same allegations that he was unable to prove following a full evidentiary trial in lawsuit #3.

In arguing on review that he is not culpable of any misconduct with respect to lawsuit #4 respondent asserts that the trial court's dismissal of lawsuit #4 was legally and factually erroneous as the doctrine of collateral estoppel could not have applied because he had sued Judge Ross for civil rights violations only in lawsuit #2 and that action was not decided on the merits of that claim. We first note that respondent did not appeal the dismissal of lawsuit #4 and therefore

[5] Even though Judge Ross was not named in lawsuit #3, the allegations of his misconduct were substantially identical to those in lawsuit #2.

cannot now assert that the dismissal was in error. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 6, pp. 513-514 [collateral attack not available to challenge non jurisdictional error].) In any event, respondent's argument misses the point. The factual allegations in support of the civil rights cause of action in lawsuit #4 were the same factual allegations that respondent had made repeatedly against Judge Ross in the prior litigations. Respondent had failed to prove those allegations time and again. A civil rights cause of action based on allegations that respondent knew he could not prove was patently frivolous and unjust. In addition, respondent's continued pursuit of Judge Ross based on meritless factual allegations is strong circumstantial evidence that he was motivated by vindictiveness, as found by the hearing judge in the present case.

Based on the above, we conclude that the record before us discloses clear violations of section 6068, subdivisions (c) and (g). Although the hearing judge found that respondent also violated section 6106, we conclude that any such violation would be duplicative of the above violations and would not change our determination of the appropriate discipline.

The State Bar has asked that we find culpability of the charged sections based on respondent's conduct in both lawsuit #1 and lawsuit #4. We decline to do so, and instead, we look to the charges and find that the totality of respondent's conduct in filing and pursuing all four of the actions is the basis of those charges.

Turning to the degree of discipline, respondent contends that if we find culpability, the discipline should be no more than a reproval. The State Bar asserts that the hearing judge's discipline recommendation is appropriate. We, in turn, are obligated to exercise our independent judgement in recommending discipline. (*In re Morse* (1995) 11 Cal.4th 184, 207.)

Respondent apparently takes issue with several of the hearing judge's findings in mitigation and aggravation. We find no merit to these arguments. Respondent's misconduct belies his claim that he acted in good faith and that his misconduct did not cause harm. In

addition, the asserted prejudice from any delay in this proceeding is simply not cognizable; respondent's files regarding the four lawsuits were available for his review.

We agree with the hearing judge that respondent's lack of other discipline before and since his present misconduct is a mitigating factor. We also agree that respondent's community service and good character evidence are mitigating factors. However, contrary to respondent's assertion, we agree with the hearing judge that the good character witnesses were not aware of the full extent of respondent's misconduct, and therefore we discount the weight to be accorded this evidence. (See std. 1.2(e)(vi).) For the most part the witnesses testified that they had a "general understanding" of the misconduct based in large measure on their conversations with respondent and his then-attorney, and most did not believe that respondent had done anything wrong. We do not further discount the good character evidence based on the other factors cited by the hearing judge.

We also agree with the hearing judge that the record clearly and convincingly establishes that respondent's misconduct harmed Judge Ross and the administration of justice and that respondent has shown no recognition of his wrongdoing. We do not agree that respondent's testimony in the State Bar proceeding regarding Baker's billings (one of the subjects of lawsuit #4) lacked candor. We do not find clear and convincing evidence that his testimony was dishonest or deceptive.

The hearing judge considered *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, to be instructive regarding the appropriate discipline. We agree. In *Sorensen*, the attorney sued the owner of a court reporting firm for fraud and deceit, seeking $14,000 in punitive damages, in connection with a simple $45 billing dispute. The court reporter incurred $4,375 in legal fees and expenses. The Supreme Court found that Sorenson pursued the action out of spite and vindictiveness and that "he acted on those base impulses by selecting the most oppressive and financially taxing means

of redress . . . ." (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1042.) The Court imposed one year stayed suspension with two years' probation on conditions including 30 days' actual suspension.

In *In the Matter of Varakin*, *supra*, 3 Cal. State Bar Ct. Rptr. 179, the attorney repeatedly filed frivolous motions and appeals in four different cases over a dozen years for the purpose of delay and harassment of his ex-wife and others. He continued this pattern despite being sanctioned numerous times. Varakin greatly harmed the individuals involved and the administration of justice, lacked insight into his misconduct, expressed no remorse, and refused to mend his ways. We recommended, and the Supreme Court imposed, disbarment.

We agree with the hearing judge that respondent's misconduct was more extensive than Sorensen's but less than Varakin's. As was the hearing judge, we too are troubled by respondent's failure to have gained insight into his misconduct. He continues to paint himself as the victim despite the many courts that have held otherwise. The discipline imposed for the misconduct here must reflect this lack of insight as well as the harm to the victim and assurance to the public and bar that such conduct will not be tolerated. (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1044.) We conclude that the hearing judge's discipline recommendation appropriately balances these values and the record as a whole.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Carey Brent Scott be suspended from the practice of law for a period of two years, that execution of the suspension be stayed, and that he be placed on probation for a period of two years, on the conditions of probation recommended by the hearing judge, including 60 days' actual suspension. We also recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and furnish satisfactory proof of such passage to the Probation

Unit of the Office of the Chief Trial Counsel within said period. Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with section 6140.7 of that Code.

OBRIEN, J.*

We concur:

STOVITZ, P. J.
EPSTEIN, J.

* Judge Pro Tem of the State Bar Court, appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

Case No. 94-O-17860

In the Matter of Carey Brent Scott

Hearing Judge

Carlos E. Velarde

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